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# CUSTOM AS A SOURCE OF JEWISH LAW: SOME RELIGIOUS REFLECTIONS ON DAVID J. BEDERMAN'S *CUSTOM AS A SOURCE OF LAW*

Michael J. Broyde\*

Professor David J. Bederman's seminal work, *Custom as a Source of Law*,<sup>1</sup> seeks to answer several foundational questions in the fields of legal theory and formation. One of the central concerns: Can custom itself *be* law? That is to say, can custom alone become binding *as custom*, acting in ways that we would typically think of as legal, even before it is ever recognized or stamped as obligatory by the institutions that we would normally think of as creating compulsory law, for example, by word of an authoritative legislative body or by way of judicial precedent?<sup>2</sup> And, if so, at what point does that pivotal shift from "should" to "must" occur?

While Professor Bederman's work is, as always, learned, thorough, and convincing,<sup>3</sup> in addition to elucidating the principles for secular custom as a source of law, he has opened the door for us to speculate on the question's applicability to another set of rules and practices, namely, religious laws and norms. And so, we ask in this short piece, can and when does *minhag* (customary Jewish practice) become *halakha* (Jewish law)?

It is important to define some terms at the outset, seeing that custom acting as law in this context will often serve the same purpose as, and be hard to distinguish from, regular legislation. Both operate to solve new problems for

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<sup>1</sup> DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* (2010).

<sup>2</sup> For a discussion of the "[m]andatory [v]iew" of customary international law (CIL), see Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204–05 (2010). Unlike treaties, the rules of CIL do not arise from express negotiation, and they do not require any domestic act of ratification to become binding. Although these differences might suggest that nations should have greater flexibility to withdraw from rules of CIL than from treaties, the conventional wisdom is precisely the opposite. According to most international law scholars, a nation may have some ability to opt out of a CIL rule by persistent objection to the rule before the time of its formation (although even that proposition is contested), but once the rule becomes established, nations that are subject to it never have the right to withdraw unilaterally from it. *Id.* at 204.

<sup>3</sup> Broadly, he advances the view that strong, objective evidence of communal practice along with a subjective calculus of the norm's inherent value as a legal requirement are the ingredients that make a custom binding.

which there is no existing law or arise when the existing law requires modification, clarification, or reform. As Israeli Supreme Court Justice Menachem Elon once put it, “The formal distinction . . . between custom and legislation is that legislation operates openly under the direction of an authorized body, whereas custom operates anonymously and nondirectedly by the agency of the entire people or of some particular segment of the people.”<sup>4</sup> To put it simply, if we wish to study a law or an enactment, we go to the legislative authorities or the courts; if we wish to know about a custom, we “go and see what the people do.”<sup>5</sup>

There is one school of thought in which this Tribute would be a very short piece indeed; according to this view, at least from a Jewish law perspective, the custom of the people cannot ever directly create *de facto* law. The fact that the public follows a particular practice is considered to be merely sufficient evidence to prove the existence of some other once-created, now-forgotten (but definitely formal) legal rule. Custom is simply a legislative trust, preserving the tradition for later generations even when the original source is lost in time. While there are several Talmudic passages that understand custom in this manner, perhaps the clearest restatement of that view comes from the post-Talmudic responsa of R. Yitzchak Alfasi: “The source of any practice customarily followed . . . is an enactment . . . and even if in the course of time the source of the practice has been forgotten, nevertheless the practice has been generally accepted and retains its legal force.”<sup>6</sup>

Following that line of thought, Nahmanides writes, “Custom is considered to be binding only when the townspeople or the communal leaders specifically and formally adopt it, but any custom not so adopted cannot override an existing legal rule unless the rule is doubtful.”<sup>7</sup> Again, according to this view, custom never masquerades as law; it simply teaches us what the original law was.

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<sup>4</sup> 2 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 881 (Bernard Auerbach & Melvin J. Sykes trans., 1994) (1988).

<sup>5</sup> *Id.* (quoting BABYLONIAN TALMUD BERACHOT 45a, and BABYLONIAN TALMUD PESACHIM 54a). While it is true that rules based on custom are subject to some eventual review by rabbinic authority and are sometimes abolished if, for example, they are based on error, *see, e.g.*, TOSAFOT, ERUVIN 101b, are unreasonable, *see, e.g.*, JERUSALEM TALMUD PESACHIM 25b, or are “bad” or ignorant customs, *see, e.g.*, TOSAFOT, BAVA BASRA 2a, s.v. Ba’gvil Hazeh), the public as a whole, and not the reviewing rabbis, is still regarded as the direct creative *source* of the normative rules that are generated by custom.

<sup>6</sup> ELON, *supra* note 4, at 883 (alterations in original) (quoting YITZCHAK ALFASI, TESHUVOT HA-RIF no. 13).

<sup>7</sup> *Id.* at 884 (quoting NAHMANIDES, novellae to BAVA BATRA 144b, s.v. Ha D’Amrinan).

The majority of Jewish law authorities, however, do believe that custom alone can itself be the source of independent legal authority, at least sometimes. The following examples, drawn from the fields of labor law and commercial law respectively, will hopefully illustrate the contours and limitations of that process.

Before we continue, it is important to note that Jewish law can be divided into two main areas of law: civil law (encompassing all of the fields that we tend to think of as part of any legal system) and ritual religious law, with family law somewhere in between. While we will attempt to test the strength and bounds of custom in the area of civil law, there are some inherent distinctions between “regular” legislation and customary law in regard to ritual religious law, where the scope and power of custom is by nature more limited. Generally speaking, in questions of ritual law, custom may not permit that which the law indisputably forbids. Still, even in that circumscribed area, custom *may* prohibit what has been permitted, and sanctions may sometimes be applied against those who transgress the customary rules.<sup>8</sup>

Custom in Jewish law can be said to perform three main functions, which operate with increasing levels of power. At the weakest level, custom determines which view is to be normatively accepted when there is a legitimate Jewish law disagreement. On a slightly stronger plane, it can supplement existing law when new questions or situations arise that preexisting norms are unable to address. At its strongest, it can creatively establish new rules that may even be contrary to existing laws or norms. It is this third category that separates the power of custom in civil law—with its creative force for change—from its weaker ritual counterpart.

Custom in civil Jewish law derives its power as a simple extension of the freedom of contract. Jewish civil law is to be seen as the default state, like much of the *Uniform Commercial Code*, and in general, it is binding only when the parties have not otherwise agreed. In monetary matters, a party is free to contract out of any law, even one explicit in the Bible, such as the laws of bailments.<sup>9</sup> Just as the parties to a transaction can agree in advance to modify the rules to fit their particular needs, when the community as a whole acts

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<sup>8</sup> See JERUSALEM TALMUD PESACHIM 26a.

<sup>9</sup> See BABYLONIAN TALMUD BAVA METZIA 94a; TOSEFTA KIDDUSHIN 3:7–8.

through custom, it is as if they had all agreed in advance to change or modify the given rules in a particular situation.<sup>10</sup>

A quick look at the *Mishna* in the seventh chapter of Tractate *Bava Metzia* will illustrate this principle. The *Mishna* states, “One who engages laborers and instructs them to arise early and retire late may not compel them to do so where the custom is not to begin early and work late.”<sup>11</sup>

The *Talmud* explains that, under biblical law, work was to begin early and end late,<sup>12</sup> but as R. Hoshaya notes, “This tells us that custom overrides the law.”<sup>13</sup> Not only does custom change the rule in this specific instance, but also, upon closer examination, custom here is overruling one of the most basic rules of general Jewish jurisprudence, namely, the idea that one who seeks to obtain something that is in another’s possession bears the burden of proving his entitlement. As the *Talmud* continues, and as R. Immi stated, “The burden of proof is on the claimant, except in this case,”<sup>14</sup> for example, the employer may not say to the laborer, “If you want to take more money for working less time than you would be entitled to under the law, the burden is on you to prove that your hours should follow the custom when the standard we were using was not immediately apparent or explicitly stipulated.” Rather, the custom supplants the law as the norm, and the burden of proof therefore shifts to the employer to prove that the hours should *not* follow custom if he wishes to detract from the wages that the worker is *customarily* entitled to. This is true regardless of the employer’s own subjective intent when doing the hiring.

Custom’s defining imprint on commercial Jewish law throughout the ages, however, is most apparent in the field of transactions. As a general rule, Jewish law prescribes very fixed and formal techniques for the transfer of ownership and the creation of binding reciprocal obligations between a buyer and a seller

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<sup>10</sup> See ELON, *supra* note 4, at 904 n.29 (quoting SHMUEL DE MEDINA, TESHUVOT MAHARASHDAM no. 380). (“Every monetary transaction may be effective on either of two bases: (1) the rules clearly set forth in our holy Torah, or enacted by the Sages in the *Talmud*, or (2) any stipulation agreed to by the parties. This is why the modes of acquisition practiced by merchants are effective although they are neither written in the Torah nor in accord with the strict law. When merchants follow a particular custom, it is as if all have agreed with one another that a transaction so entered into shall be effective, and transactions are entered into with that understanding.”).

<sup>11</sup> BABYLONIAN TALMUD BAVA METZIA 7.

<sup>12</sup> Based on the Bible, “The sun ariseth, they gather themselves together, and lay them down in their dens. Man goeth forth unto his work and to his labour until the evening.” *Psalms* 104:22–23 (King James).

<sup>13</sup> JERUSALEM TALMUD BAVA METZIA 27b.

<sup>14</sup> *Id.* 50a.

(for example, pulling or lifting a purchased article of personal property),<sup>15</sup> methods that were definitely inconvenient and often at variance with the evolving needs of the business place and the demand for flexibility in modern commercial life. The source for the causative capability and the binding nature of custom in mercantile practice (*minhag socharim*) is the *Talmud in Bava Metzia*:

R. Papi said in the name of Rava: "Affixing the *sitomta* (seal) is a mode of acquisition." To what extent is it effective? R. Haviva said: "It signifies complete transfer of ownership." The Rabbis said: "It merely subjects one [who afterward does not follow through on the agreement] to the imprecation 'He who punished . . .'" The law is that it merely subjects one to the imprecation. . . . However in places where it is the custom that it transfers ownership, it is effective to do so.<sup>16</sup>

The distinctions that we have been embracing thus far, between (1) law, (2) custom, and (3) custom functioning as law, are all clearly defined in this discussion. First, according to R. Haviva, affixing the *sitomta* creates a legal obligation, just like any other mode of acquisition. Second, according to the rabbis, the act creates a moral and religious obligation for the buyer to follow through, such that one who does not keep it may be cursed, but one that is not, at the end of the day, *legally* enforceable. Third, the *law* in fact follows the rabbis, and yet in places where the *sitomta* is *customarily* acceptable as a legitimate mode of transfer, it does in fact accomplish the transfer to the same extent as any other *legal* mode of acquisition and is thus enforceable.

But that is not the end of the *sitomta*'s innovative influence on Jewish commercial law. While there are those that disagree,<sup>17</sup> according to several prominent early Talmudic commentators,<sup>18</sup> a *sitomta* mechanism (i.e., a culturally customary mode of transaction) is not only able to function as an

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<sup>15</sup> See BABYLONIAN TALMUD KIDDUSHIN 1:5; RITVA, BABYLONIAN TALMUD KIDDUSHIN 25b.

<sup>16</sup> BABYLONIAN TALMUD BAVA METZIA 74a; *accord id.* 44a ("He who punished the generations of the Flood and of the Dispersion will exact payment from one who does not stand by his word."). A *sitomta* is the seal that a shopkeeper makes on a barrel of wine to signify that it is his. Oftentimes shopkeepers would buy wine wholesale and in bulk; they would then leave the barrels stored in the seller's warehouse until such time as they were needed and would mark them with their seal to indicate which barrels had already been bought.

<sup>17</sup> See MORDECHAI, BABYLONIAN TALMUD SHABBAT 472. A similar approach can be found in TESHUVOT RADBAZ 1:278, and is accepted as correct by ARYEH LEIB HA-KOHN HELLER, KITZOT HA-HOSHEN ON SHULHAN ARUKH, HOSHEN MISHPAT 201:1.

<sup>18</sup> See, e.g., TESHUVOT HA-ROSH 13:20; MORDECHAI, BABYLONIAN TALMUD SHABBAT 472 (quoting Maharam Me'Rutenberg); see also JACOB LORBERBAUM, NETIVOT HA-MISHPAT, BIURIM ON SHULHAN ARUKH, HOSHEN MISHPAT 201:1 (appearing to agree).

*equivalent* to the classic legal methods, it can be even be effective to accomplish tasks that *cannot normally be transacted at all according to Jewish law*.<sup>19</sup> For example, *halakha* has no native mechanism for transferring ownership of an item that does not now exist in the world, or for the transfer of items to someone who does not yet exist. According to this approach, however, if the common commercial practice of a particular society included a procedure for such transfers, Jewish law in that locale would incorporate the practice as both valid and (customarily) enforceable. The *sitomta* then is indeed an instance where custom is even stronger (or at least more widely effective) than the law itself. Thus, the Rashba writes: “Great is the power of the community, which triumphs even without a *kinyan* . . . . Even something which is not yet in existence can be sold to someone who does not yet exist [if community practice so provides].”<sup>20</sup>

The principle behind the *sitomta* ruling paved the way for all kinds of developments in Jewish commercial law, leading the Rashba to note, “From this [the *sitomta* rule] we learn that custom overrides the law in all similar situations [and] that custom determines the validity of acquisitions and transfers in all matters of civil law; therefore merchants may acquire anything in any matter that conforms to their usual practice.”<sup>21</sup>

The principle also led the Shulchan Aruch to codify as follows: “The same applies to any mercantile practice engaged in as a mode of acquisition, such as a buyer’s giving a coin to the seller, or a handshake by the parties . . . or . . . the delivery of the key to the buyer . . . all are similar acts.”<sup>22</sup>

The underlying Jewish law flexibility in the development of binding customs within communities and even within specific trades<sup>23</sup> has been

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<sup>19</sup> See Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1767 (1997).

<sup>20</sup> TESHUVOT HA-RASHBA 1:546. *Kinyan* is the formal transfer method mandated by Jewish law.

<sup>21</sup> CHIDDUSHEI HA-RASHBA, s.v. Meshalem Lei (discussing BABYLONIAN TALMUD BAVA METZIA 74a). An excellent example of a modern-day remnant of the binding nature of customary modes of transaction in Jewish law can be seen in the Hasidically dominated Diamond District of New York City. The Diamond Dealers Club on Forty-Seventh Street, the central marker for diamond trading in the United States, conducts its mandatory arbitration proceedings under the rules of Talmudic law. Throughout the diamond-dealing industry, Jews and gentiles alike conduct their business using rules that have been around for generations and that are based on honesty and trust with no written contracts. Section 1 of the trade rules of the DDC bylaws states, “Any oral offer is binding among dealers, when agreement is expressed by the accepted words ‘Mazel and Broche’ or any other words expressing the words of accord.” DIAMOND DEALERS CLUB BYLAWS art. 18, § 1 (1980).

<sup>22</sup> SHULCHAN ARUCH, CHOSHEN MISHPAT 201:1–2.

<sup>23</sup> For example, see BABYLONIAN TALMUD BAVA KAMMA 116b.

invaluable in allowing Jewish merchants across time and space to conduct their business using the mechanisms of the places they have found themselves in. Because common usage matters, secular customs are generally considered valid and may even be incorporated into Jewish law (provided that the practices stipulated are not otherwise prohibited by *halakha*).<sup>24</sup> While there is a *halachik* question as to whether the creative power of custom is enough to finalize a transaction solely by oral agreement (in contrast to the clear Talmudic statement to the contrary,<sup>25</sup> accepted by the Shulchan Aruch<sup>26</sup>), following the ruling of the Radbaz,<sup>27</sup> most subsequent *halachik* authorities have ruled that even that case is no different than the *sitomta*. Some authorities also limit the new modes of acquisition to transactions involving personal, as opposed to real, property,<sup>28</sup> but most have held that there is no such distinction.<sup>29</sup> Thus, in the modern State of Israel, rabbinic courts recognize the transfer of ownership of land by registration in the land registry or by contract as a mode of acquisition valid under Jewish law by virtue of custom.<sup>30</sup>

Having established that customs can quite often become their own form of quasi-Jewish law, we are left with one final question: When and why does this sometimes happen? Or, in the immortal words of David Bederman, “What defines that extra, subjective ingredient” that makes certain customs act like law?<sup>31</sup>

Bederman is left to confess that there is not one unified theory that can account for custom as a source of law in all different traditions. Roman law, for example, tended to emphasize the consent of the relevant community embracing the practice, while canon law introduced a naturalist vision of the reasonability and necessity of the usage. English common law espoused the “artificial reason” of judges in assessing the value of customs that met certain minimum standards, while at the same time speaking in an almost Austinian idiom of the compulsion of those who follow them.<sup>32</sup>

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<sup>24</sup> See Michael J. Broyde, *A Jewish Law View of World Law*, 54 EMORY L.J. 79, 86 (2005).

<sup>25</sup> See BABYLONIAN TALMUD BAVA METZIA 48a (“[O]ral agreements do not affect a transfer of ownership.”).

<sup>26</sup> SHULCHAN ARUCH, CHOSHEN MISHPAT 189:1. This is true even if there are witnesses to the transaction.

<sup>27</sup> TESHUVOT RADBAZ 1:278.

<sup>28</sup> See BAYIT CHADASH TO TUR, CHOSHEN MISHPAT 201:2.

<sup>29</sup> E.g., SHULCHAN ARUCH, CHOSHEN MISHPAT 201:6.

<sup>30</sup> See, e.g., *Kraka Ltd. v. Assaf Rothenburg & Partners*, 4 PDR 75, 81 (Isr.).

<sup>31</sup> BEDERMAN, *supra* note 1, at 173.

<sup>32</sup> *Id.*



Jewish law can lay claim to all of these reasons and one more approach at justification that the others have not attempted. For a custom to be binding, it must be commonly accepted. As Maimonides writes, “In all these and similar matters, the custom of the country is a fundamental consideration and must be followed, provided that the custom has spread throughout the country.”<sup>33</sup> It also needs to have been clearly accepted and consented to by the people: “It must be known that the custom is established and widespread, and that the townspeople have followed it at least three times, because the people often make ad hoc responses to some particular need without intending thereby to establish any general custom.”<sup>34</sup>

Customs must be *prima facie* reasonable under normative Jewish law,<sup>35</sup> may arise out of necessity, and are sometimes subject to authoritative assessment and judicial review. But according to at least one school of thought in Jewish law, the real reason that *minhag* is binding as a source of *halakha* is because customary practices are, in fact, somewhat divine in nature.

The *Talmud* tells us that when Hillel the Elder was asked a question regarding the bringing of the paschal sacrifice on the Sabbath, he answered, “I have heard this law but I forgot it.”<sup>36</sup> He then assured the anxious priests that they did not have to worry; they could simply rely on the custom and follow whatever actions the people normally took: “However leave it to [the people of] Israel; if they are not prophets, they are the descendants of prophets.”<sup>37</sup> In the version in the *Tosefta*, the reading of divine interplay in the formation of customary practices is even clearer. Hillel explicitly says, “Leave them alone, *they are inspired with the heavenly spirit*. If they are not prophets, they are the descendants of prophets.”<sup>38</sup>

Regardless of why custom can be binding as a source of law—whether it is simply an outgrowth of necessity, practicality, and consent, or whether it hearkens back to earlier forgotten legalities, or even if custom acts as a somewhat watered down bridge between Heaven and Earth, expressing and reflecting God’s ultimate will in how the practice of the people should look—it is clear that custom as a source of law is a topic worthy of the weighty analysis

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<sup>33</sup> ELON, *supra* note 4, at 928 (quoting MAIMONIDES, MISHNEH TORAH, ISHUT 23:12).

<sup>34</sup> *Id.* (quoting TERUMAT HA-DESHEH no. 342).

<sup>35</sup> See MAIMONIDES, MISHNEH TORAH, SHEVITAT ASOR 3:3.

<sup>36</sup> ELON, *supra* note 4, at 901.

<sup>37</sup> BABYLONIAN TALMUD PESACHIM 66a.

<sup>38</sup> ELON, *supra* note 4, at 902 n.18 (emphasis added) (quoting TOSEFTA PESACHIM 4:14).

and deep consideration that David J. Bederman has given it. For this, and for all his other work, we remain extremely grateful.

There is an ancient rabbinic tradition that scholars, even after their death, are always referred to in the present tense and never in the past tense. Thus, we say “Maimonides says,” rather than “Maimonides said,” even though Maimonides died in 1204. The classical explanation is that scholars live on through their works and words. Although David J. Bederman died on Sunday, December 4, 2011, he lives on as a scholar. His words and works will never die.